NO. 46819-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

LONZELL GRAHAM, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Garold E. Johnson

No. 14-1-01950-7

BRIEF OF RESPONDENT

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2. Whether defendant fails to show that RCW 43.43.7541 is unconstitutional as applied to indigent defendants when defendant lacks standing to make such a challenge, his claims are not ripe for review and Washington courts have already addressed and rejected such a claim?

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B. STATEMENT OF THE CASE.

1. Procedure

On May 20, 2014, the Pierce County Prosecutor's Office charged LONZELL GRAHAM, hereinafter "defendant," with one count of domestic violence court order violation. CP 1-2. The case proceeded to trial in front of the Honorable Garold Johnson. RP 3. After a CrR 3.6 hearing was held, the court denied defendant's motion to suppress and found that Officer Hobbs had a reasonable, articulable suspicion to stop defendant's vehicle for defective windshield wipers and tinted windows. RP 97-99; CP 63-65. The trial court entered findings of fact and conclusions of law on the issue. CP 63-65.

After a jury trial, defendant was convicted as charged and sentenced to a standard range of 60 months. RP 325, 348; CP 25-26, 50-62. The court also imposed legal financial obligations including a $100 DNA database fee and a $500 DAC recoupment fee. RP 348-350; CP 50-62. Defendant filed a timely notice of appeal. CP 71-72.

2. Facts[1]

On May 18, 2014, City of Milton Officer Don Hobbs was on patrol on Pacific Avenue in Milton when he observed a vehicle coming towards him. RP 53-57. Officer Hobbs noticed the two windshield wipers stuck

[1] Defendant raises an issue regarding the CrR 3.6 suppression hearing, and thus the facts are taken primarily from that hearing as they are relevant to the issue he has raised.

on the windshield in an upright position even though it was sunny out and believed they were defective and possibly obscuring the driver's view. RP 57-59, 97-98; CP 63-65. Based on his training and experience, Officer Hobbs also believed the front windows appeared to be tinted darker than what was allowed by law. RP 57-58, 98; CP 63-65. Officer Dobbs stopped the vehicle for the defective windshield wipers and tinted windows and contacted the driver, later identified as the defendant. RP 58-59, 98; CP 63-65. The defendant admitted he had bought the vehicle with defective windshield wipers and said that someone else had put the tint on the windows for him. RP 59.

Officer Hobbs observed a female sitting in the passenger seat and took a photo of the windshield wipers and windows. RP 59-60. After contacting dispatch to check defendant's license status, Officer Hobbs learned defendant was the respondent in a no contact order. RP 61; CP 63-65. The protected person was listed as a white female named Tasha Lamb. RP 62-65; CP 63-65. Officer Hobbs contacted the passenger in defendant's vehicle and identified her by her Washington ID as Tasha Lamb. RP 65; CP 63-65. After confirming the no contact order was valid and in effect, Officer Hobbs arrested the defendant. RP 66; CP 63-65. Defendant was also issued an infraction for the defective windshield wipers and the window tints after Officer Hobbs used a tint meter and confirmed they were darker than allowed by law. RP 69-73; CP 63-65.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED DEFENDANT'S MOTION TO SUPPRESS AND FOUND THAT THE OFFICER HAD A REASONABLE, ARTICULABLE SUSPICION TO STOP THE VEHICLE BASED ON WHAT HE BELIEVED WERE DEFECTIVE WINDSHIELD WIPERS AND TINTED WINDOWS.

A trial court's decision to deny a motion to suppress is reviewed for an abuse of discretion. ***State v. Guloy***, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. ***State ex rel Carroll v. Junker***, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

A trial court's findings of fact are reviewed for substantial evidence and the conclusions of law are reviewed de novo. ***State v. Carter***, 151 Wn.2d 118, 125, 85 P.3d 887 (2004). Credibility determinations are for the trier of fact and are not subject to appellate review. ***State v. Camarillo***, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Unchallenged findings of fact are accepted as verities on appeal, and will not be reviewed by the appellate court. ***State v. Hill***, 123 Wn.2d 641, 644-47, 870 P.2d 313 (1994).

Unlawful searches and seizures are per se unreasonable. The U.S. Constitution prohibits unlawful searches and seizures; the Washington State

constitution goes even further and requires authority of law before the State may disturb an individual's private affairs. U.S. Const. amend IV; Const. art I §7. There are however, certain "narrowly and jealously drawn" exceptions to the warrant requirement. ***State v. Stroud***, 106 Wn.2d 144, 147, 720 P.2d 436 (1986). One such exception is a ***Terry*** stop. ***State v. Glossberner***, 146 Wn.2d 670, 680, 49 P.3d 128 (2002).

Probable cause for a stop exists when there is a reasonable suspicion that criminal activity is afoot. ***Terry v. Ohio***, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Specifically, an investigatory stop is lawful if the officer possesses "specific articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id.* at 21. A seizure is reasonable and lawful when it is based on an officer's objectively reasonable suspicion that an individual has engaged in criminal activity. ***State v. Armenta***, 134 Wn.2d 1, 10, 948 P.2d 1280 (2004). The police are authorized to detain suspects a brief time for questioning when there is an articulable suspicion, based on objective facts, that the suspect is involved in some type of criminal activity. ***Brown v. Texas***, 443 U. S. 47, 99 S. Ct 2637, 61 L. Ed. 2d 357 (1979).

Officers only need reasonable suspicion, not probable cause, to stop a vehicle in order to investigate whether the driver committed a traffic infraction or a traffic offense. *See* ***State v. Duncan***, 146 Wn.2d 166, 173-75, 43 P.3d 513

(2002). Traffic violations create a unique set of circumstances that justify the extension of ***Terry*** "due to the law enforcement exigency created by the ready mobility of vehicles and governmental interests in ensuring safe travel, as evidenced in the broad regulation of most forms of transportation." ***State v. Johnson***, 128 Wn.2d 431, 454, 909 P.2d 293 (1996)(*citing* ***United States v. Ross***, 456 U.S. 798, 806-07, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982)).

In reviewing the propriety of a ***Terry*** stop for a traffic infraction, a court evaluates the totality of the circumstances. ***State v. Doughty***, 170 Wn.2d 57, 62, 239 P.3d 573 (2010); ***State v. Glover***, 116 Wn.2d 509, 806 P.2d 760 (1991). The court takes into account an officer's training and experience when determining the reasonableness of a ***Terry*** stop. ***Glover***, 116 Wn.2d at 514. Subsequent evidence that the officer was in error regarding some of his facts will not render a ***Terry*** stop unreasonable. ***State v. Seagull***, 95 Wn.2d 898, 908, 632 P.2d 44 (1981) ("The Fourth Amendment does not proscribe 'inaccurate' searches only 'unreasonable' ones").

The question of a valid stop does not depend upon the motorist actually having violated the statute. Rather, if the officer had a reasonable, articulable suspicion that the motorist was violating the statute, the stop was justified. ***State v. Snapp***, 174 Wn.2d 177, 197, 275 P.3d 289 (2012)(stop for violation of RCW 46.37.020 was lawful, despite the fact that sunset occurred less than 30 minutes

prior to the stop, as it was dark, cold, and icy and the vehicle's headlights were off).

RCW 46.37.410 reads:

> (3)... After January 1, 1938, it shall be unlawful for any person to operate a new motor vehicle first sold or delivered after that date which is not equipped with such device or devices in good working order capable of cleaning the windshield thereof over two separate arcs, one each on the left and right side of the windshield, each capable of cleaning a surface of not less than one hundred twenty square inches, or other devices capable of accomplishing substantially the same result.
>
> (4) Every windshield wiper upon a motor vehicle shall be maintained in good working order.

Likewise, RCW 46.37.430 entitled "Safety glazing – Sunscreening or coloring" describes the limitations on the darkening of windows in a vehicle and states that "[i]t is a traffic infraction for any person to operate a vehicle for use on the public highways of this state, if the vehicle is equipped with film sunscreening or coloring material in violation of this section." RCW 46.37.430(7).

In the present case, the trial court denied defendant's motion to suppress and found the officer had a reasonable, articulable suspicion to stop defendant's vehicle based on the belief defendant was driving with defective windshield wipers and tinted windows. The trial court issued the following relevant findings of fact and conclusions of law on the issue:

Undisputed Facts

1. On May 18, 2014, Milton Police Officer Donald Hobbs observed a vehicle traveling south bound at the 7800 block of Pacific Highway in Milton, WA. He observed the vehicle's windshield wipers were stuck in an upright position and it was not raining. Officer Hobbs observed the vehicle's window were darker than allowed by law. Based on his training and experience as a patrol officer for approximately ten years, Officer Hobbs pulled the vehicle over.

Conclusions of Law

3. The court found Officer Hobbs' testimony credible.

4. Officer Hobbs had an articulable reasonable suspicion [to] conduct a traffic stop and was legally authorized to contact the defendant.

CP 63-65.

Defendant challenges Finding of Fact 1 arguing that the record fails to support that Officer Hobbs' stop of the defendant was based on a suspected windshield wiper violation because having the windshield wipers in an upright position does not violate RCW 46.37.410. *See* Brief of Appellant at 7. However, Officer Hobbs testified that he observed the windshield wipers sticking straight up and based on his training and experience, he did not believe they were capable of working properly in violation of RCW 46.37.410. RP 57-58. The trial court found Officer Hobbs' testimony credible. CP 63-65 (Conclusion of Law 3). Credibility determinations are not subject to appellate review. ***Camarillo***, 115 Wn.2d at 71. Whether the windshield wipers were in fact defective is irrelevant. *See* ***State v. Snapp***, 174 Wn.2d 177, 197, 275 P.3d 289 (2012)(stop for

violation of RCW 46.37.020 was lawful, despite the fact that sunset occurred less than 30 minutes prior to the stop, as it was dark, cold, and icy and the vehicle's headlights were off). Officer Hobbs believed the windshield wipers were defective in violation of RCW 46.37.410 and the trial court found Officer Hobbs' testimony credible. The record supports the trial court's findings and conclusion that Officer Hobbs had a reasonable articulable suspicion to stop the defendant's vehicle. The trial court did not abuse its discretion in denying defendant's motion to dismiss.

Likewise, defendant also challenges the trial court's finding that Officer Hobbs observed defendant's windows were tinted darker than what was allowable by law. *See* Brief of Appellant at 9-10. However, Officer Hobbs testified that based on his training and experience, he believed the windows were darker than what was allowed in RCW 46.37.430. RP 57-59. Again, the trial court found Officer Hobbs' testimony credible, and credibility determinations are not subject to review. CP 63-65 (Conclusion of Law 3); ***Camarillo***, 115 Wn.2d at 71. Whether the windows were actually too dark is irrelevant to the court's inquiry of whether the officer had a reasonable, articulable suspicion to stop the vehicle.

Similarly, Officer Hobbs training and experience is not limited to what his tint meter reads. He testified he has been involved "numerous,

numerous stops on tinted windows and I know what a dark tinted window looks like that's darker than allowed by law." RP 58. All that is required with regard to the court's inquiry is whether Officer Hobbs had a reasonable, articulable suspicion to stop the defendant's vehicle. The record supports the trial court's findings and conclusion that based on his training and experience, Officer Hobbs believed defendant's windows were darker than what is allowed by law. The trial court properly denied defendant's motion to suppress as Officer Hobbs had a reasonable, articulable suspicion to stop the defendant's vehicle based on his belief the windshield wipers were defective and his belief the windows were tinted too dark.

2. DEFENDANT FAILS TO SHOW THAT RCW 43.43.7541 IS UNCONSTITUTIONAL AS APPLIED TO INDIGENT DEFENDANTS AS HE LACKS STANDING TO CHALLENGE THE CONSTITUTIONALITY OF THE STATUTE, HIS CLAIM IS NOT RIPE FOR REVIEW, AND WASHINGTON COURTS HAVE ALREADY CONSIDERED AND REJECTED THIS CLAIM.

The federal and Washington State Constitutions guarantee that the federal and state governments will not deprive an individual of "life, liberty, or property, without due process of the law." U.S. Const. amends. V, XIV, § 1.2. Wash. Const. art. I, § 3[2]. The due process clause confers

[2] Generally, "Washington's due process clause does not afford broader protection than that given by the Fourteenth Amendment to the United States Constitution." ***State v. McCormick***, 166 Wn.2d 689, 699, 213 P.3d 32 (2009).

both procedural and substantive protections. ***Amunrud v. Bd. Of Appeals***, 158 Wn.2d 208, 216, 143 P.3d 571 (2006). "Substantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures." ***Nielsen v. Washington State Dept. of Licensing***, 177 Wn. App. 45, 53, 309 P.3d 1221 (2013)(*quoting* ***Amunrud***, 158 Wn.2d at 218-19).

The level of review in a due process challenge depends upon the nature of the interest involved. ***Nielsen***, 177 Wn. App. at 53 (*citing* ***Amunrud***, 158 Wn.2d at 219). When a state action does not affect a fundamental right, as in this case, the proper standard of review is rational basis. ***Amunrud***, 158 Wn.2d at 222. Rational basis requires that a challenged law be "rationally related to a legitimate state interest." ***Nielsen***, 177 Wn. App. at 53 (*quoting* ***Amunrud***, 158 Wn.2d at 222). The court should "assume the existence of any necessary state of facts which [they] can reasonably conceive in determining whether a rational relationship exists between the challenged law and a legitimate state interest" when applying this deferential standard. ***Nielsen***, 177 Wn. App. at 53 (*quoting* ***Amunrud***, 158 Wn.2d at 222).

A statute is presumed constitutional, and the party challenging the legislation bears the burden of proving the legislation is unconstitutional

beyond a reasonable doubt. ***State ex rel. Peninsula Neighborhood Ass'n v. Dep't of Transp.***, 142 Wn.2d 328, 335, 12 P.3d 134 (2000).

a. Defendant lacks standing to challenge the constitutionality of the DNA fee as violating substantive due process

In the present case, defendant asks the court to find RCW 43.43.7541 violates substantive due process when applied to defendants who do not have the ability, or likely ability to pay as it does not rationally relate to the State's interest in funding the collection, testing and retention of the defendant's DNA. Brief of Appellant, at 15. However, because defendant has not been found to be constitutionally indigent, he does not have standing to make this constitutional challenge.

A defendant cannot argue the constitutionality of a statute unless he has been adversely affected by the provisions he claims are unconstitutional. ***State v. Lundquist***, 60 Wn.2d 397, 401, 374 P.2d 246 (1962). A litigant does not have standing to challenge a statute on constitutional grounds unless the litigant has suffered actual damage or injury under the statute. ***Kadoranian by Peach v. Bellingham Police Dep't***, 119 Wn.2d 178, 191, 829 P.2d 1061 (1992).

To prove standing, a defendant must satisfy both prongs of a two pronged test. ***State v. Johnson***, 179 Wn.2d 534, 552, 315 P.3d 1090 (2014)(*citing* ***Branson v. Port of Seattle***, 152 Wn.2d 862, 876, 101 P.3d 67 (2004)). First, he must show "a personal injury fairly traceable to the

challenged conduct and likely to be redressed by the requested relief." ***Johnson***, 179 Wn.2d at 552 (*quoting* ***High Tide Seafoods v. State***, 106 Wn.2d 695, 702, 725 P.2d 411 (1986)). Second, he must show that his claim falls within the zone of interests protected by the statute or constitutional provision at issue. ***Johnson***, 179 Wn.2d at 552 (*citing* ***Branson***, 152 Wn.2d at 875).

In ***Bearden v. Georgia***, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983), the United States Supreme Court held that "the due process and equal protection clauses prevent a state from invidiously discriminating against, or arbitrarily punishing, indigent defendants for their failure to pay fines they cannot pay." ***Johnson***, 179 Wn.2d at 552 (*citing* ***Bearden***, 461 U.S. at 664). In ***State v. Blank***, 131 Wn.2d 230, 930 P.2d 1213 (1997), the Washington State Supreme Court clarified that the Constitution does not require an inquiry into ability to pay at the time of sentencing, but rather at the time of collection and when sanctions are sought for nonpayment. ***Blank***, 131 Wn.2d at 241-242.

A constitutional violation like the one defendant alleges in the present case, only occurs when the State seeks to sanction a constitutionally indigent defendant. While defendant may be considered statutorily indigent, that does not mean he is constitutionally indigent within the meaning of ***Bearden*** and ***Blank***. *See* ***In re Smith***, 323 F.Supp. 1082, 1091 (D.Colo.1971)(noting that statutory indigence is different from

constitutional indigence). In ***Johnson***, the Supreme Court rejected a constitutional challenge to the driving while license suspended statute based on a claim of indigence because Johnson, while statutorily indigent, was not constitutionally indigent and therefore not in the class protected by the due process clause. ***Johnson***, 179 Wn.2d at 555.

While no precise definition of constitutional indigence exists, it has been described as meaning "without funds"[3] and "***Bearden*** essentially mandates that we examine the totality of the defendant's financial circumstances to determine whether he or she is constitutionally indigent in the face of a particular fine." ***Johnson***, 179 Wn.2d at 553-54. It is up to the party seeking review of an issue to provide an adequate record for review. ***City of Spokane v. Neff***, 152 Wn.2d 85, 91, 93 P.3d 158 (2004). There is nothing in the record regarding defendant's financial status, other than a comment he is on social security, for the court to find he is constitutionally indigent. As a result, defendant fails to show he is constitutionally indigent and thus, like Johnson, lacks standing for his claim to challenge the constitutionality of RCW 43.43.7541.

b. <u>The issue is not ripe for review and the court should decline to address it.</u>

Even if the court were to find defendant has standing to bring this constitutional challenge, the issue is not ripe for review. A condition of

[3] ***Johnson***, 179 Wn.2d 553. (*quoting* ***Williams v. Illinois***, 399 U.S. 235, 242, 90 S. Ct. 2018, 26 L. Ed. 2d 586 (1970)).

sentence is not ripe for review until the defendant has been harmfully affected by the challenged condition. ***State v. Massey***, 81 Wn. App. 198, 200, 913 P.2d 424 (1996). Specifically, it is only when the State attempts to collect or impose punishment for failure to pay that constitutional principles are implicated. Adopting the view of the Second Circuit on this issue, Division I stated:

> imposition of assessments on an indigent, per se, does not offend the Constitution. Constitutional principles will be implicated... only if the government seeks to enforce collection of the assessments" 'at a time when [the defendant is] unable, through no fault of his own, to comply.
>
> ...
>
> It is at the point of enforced collection..., where an indigent may be faced with the alternatives of payment or imprisonment, that he may assert a constitutional objection on the ground of his indigency.

State v. Curry, 62 Wn. App. 676, 681, 814 P.2d 1252 (1991), *affirmed* by ***State v. Curry***, 118 Wn.2d 911, 829 P.2d 166 (1992)(*quoting* ***United States v. Pagan***, 785 F.2d 378, 381-382 (2d Cir.1986), *cert. denied*, ***Pagan v. United States***, 479 U.S. 1017, 107 S. Ct. 667, 93 L.Ed.2d 719 (1986)(internal citations omitted)).

The Washington State Supreme Court reaffirmed this position in ***Blank*** when it held that an inquiry into defendant's ability to pay is not constitutionally required before imposing costs, as long as there is a requirement that the court determines whether there is an ability to pay

before collection or sanctions are sought for nonpayment. ***Blank***, 131 Wn.2d at 239-42. The rational is that if at that time defendant is unable to pay through no fault of his own, constitutional fairness principles are implicated. *Id.* at 242. Furthermore, at the time of sentencing the court's decision as to whether the defendant has the likely future ability to pay is, at best, an educated guess. It is more appropriate to wait until the time of collection to make this determination when more relevant and related information will be available.

Defendant in the present case objected to the imposition of the DNA fee during the trial court's imposition of legal financial obligations (hereinafter "LFOs") during sentencing. RP 349. However, the State has not yet sought to collect or impose punishment for defendant's failure to pay. Thus, no constitutional principles have been implicated as described in ***Curry*** and ***Blank***. This issue is not ripe for review and the court should decline to address it.

c. <u>If the court were to reach the merits of the issue, defendant still fails to show the DNA fee violates due process.</u>

The Washington Supreme Court has already upheld the constitutionality of Washington statutes providing for payment of mandatory costs as applied to indigent defendants in ***State v. Curry***, 118 Wn.2d 911, 829 P.2d 166 (1992). In that case, the Court recognized that it is fundamentally unfair to imprison indigent defendants solely because of

their inability to pay court-ordered fines, and held that there were sufficient safeguards in the sentencing scheme to prevent the imprisonment of indigent defendants. ***Curry***, 118 Wn.2d at 918. Agreeing with Division I of the Court of Appeals, the Supreme Court discussed how:

> [u]nder RCW 9.94A.200[4], a sentencing court shall require a defendant the opportunity to show cause why he or she should not be incarcerated for a violation of his or her sentence, and the court is empowered to treat a nonwillful violation more leniently. Moreover, contempt proceedings for violations of a sentence are defined as those which are *intentional*. RCW 7.21.010(1)(b). Thus, no defendant will be incarcerated for his or her inability to pay the assessment unless the violation is willful.

Curry, 118 Wn.2d at 918 (emphasis in original).

While ***Curry*** discussed the mandatory crime victim penalty assessment fee, this principle has been extended to all mandatory legal financial obligations, including the DNA collection fee required by RCW 43.43.7541. *See* ***State v. Lundy***, 176 Wn. App. 96, 103-03, 308 P.3d 755 (2013); *See also* ***State v. Kuster***, 175 Wn. App. 420, 424-26, 306 P.3d 1022 (2013); *See also* ***State v. Thompson***, 153 Wn. App. 325, 336-337, 223 P.3d 1165 (2009). Although RCW 9.94A.200 has been recodified (more than once), the same safeguards against imprisonment of indigent defendants discussed in ***Curry*** remain in effect today. *See* RCW 9.94B.040; *See also* RCW 7.21.010(1)(b). As a result, the mandatory

[4] Recodified as § 9.94A.634 in 2001 and later recodified as § 9.94B.040 in 2008.

DNA fee in RCW 43.43.7541 does not violate substantive due process as applied to indigent defendants.

Defendant attempts to use the Supreme Court's recent decision in ***State v. Blazina***, 182 Wn.2d 827, 344 P.3d 680 (2015), to argue that imposition of mandatory DNA fees upon indigent defendants at sentencing without inquiring into the defendant's ability to pay violates substantive due process. ***Blazina*** held that RCW 10.01.160(3) necessitates that prior to imposing discretionary legal financial obligations upon a defendant, the court must conduct an individualized inquiry into the defendant's ability to pay. ***Blazina***, 182 Wn.2d 837-38.

However, the ruling in ***Blazina*** is distinguishable from the present case for two reasons. First, the ***Blazina*** holding is based on statutory construction and related to whether the trial court violated RCW 10.01.160, not the Constitution as alleged in the present case. Second, ***Blazina*** discussed the failure to inquire into the ability to pay before imposing discretionary LFOs, not mandatory ones like the DNA fee at issue in the present case. *See* ***Blazina***, 182 Wn.2d at 837-38 ("Blazina and Paige-Colter argue that, in order to impose discretionary LFOs under RCW 10.01.160(3), the sentencing judge must consider the defendant's individual financial circumstances and make an individualized inquiry into the defendant's current and future ability to pay.... We agree.") Thus, ***Blazina***'s holding is inapplicable to and has no bearing on defendant's

claim of a constitutional violation of substantive due process in the present case.

The ***Blazina*** decision has no impact on and does not change the principle articulated in ***Curry*** that mandatory LFOs are constitutional so long as there are sufficient safeguards to prevent imprisonment of indigent defendants. Defendant fails to show the mandatory DNA fee required by RCW 43.43.7541 violates substantive due process as applied to indigent defendants.

3. DEFENDANT FAILS TO SHOW RCW 43.43.7541 VIOLATES EQUAL PROTECTION WHEN IT IS RATIONALLY RELATED TO THE STATE'S INTEREST IN INVESTIGATING AND PROSECUTING DEFENDANTS CHARGED WITH SEXUAL OFFENSES AND VIOLENT OFFENSES.

Under the equal protection clause of the Washington State Constitution, article I, section 12, and the Fourteenth Amendment to the United States Constitution, persons similarly situated with respect to the legitimate purpose of the law must receive like treatment. ***Harmon v. McNutt***, 91 Wn.2d 126, 130, 587 P.2d 537 (1978). There are two tests for analyzing an equal protection claim and "whenever legislation does not infringe upon fundamental rights or create a suspect classification", the rational relationship test is used. ***State v. Smith***, 93 Wn.2d 329, 336, 610 P.2d 869, *cert. denied*, 449 U.S. 873, 101 S. Ct. 213, 66 L. Ed. 2d 93 (1980).

Equal protection challenges to the DNA statute do not infringe upon fundamental rights or create a suspect classification and are thus subject to a rational basis standard of review. ***State v. Olivas***, 122 Wn.2d 73, 94-95, 856 P.2d 1076 (1993). Under the rational relationship test, the law being challenged must rest upon a legitimate state objective, and the law must not be wholly irrelevant to achieving that objective. ***State v. Schaaf***, 109 Wn.2d 1, 17, 743 P.2d 240 (1987).

The party challenging the classification has the burden to show that the classification is purely arbitrary. ***State v. Coria***, 120 Wn.2d 156, 172, 839 P.2d 890 (1992). The rational basis test requires only that the means employed by the statute be rationally related to a legitimate State goal, not that the means be the best way of achieving that goal. *Id.* at 173. "[T]he Legislature has broad discretion to determine what the public interest demands and what measures are necessary to secure and protect that interest." ***State v. Ward***, 123 Wn.2d 448, 516, 869 P.2d 1062 (1994).

The DNA testing statute only applies to persons who have committed "sex offenses" or "violent offenses". ***State v. Olivas***, 122 Wn.2d 73, 95, 856 P.2d 1076 (1993); RCW 43.43.754. The purpose of the statute is to investigate and prosecute sex offenses and violent offenses. Laws of 1989, ch. 350, § 1. The legislature has expanded upon this by finding that:

> DNA databases are important tools in criminal investigations, in the exclusion of individuals who are the subject of investigations or prosecutions, and in detecting recidivist acts. It is the policy of this state to assist federal, state, and local criminal justice and law enforcement agencies in both the identification and detection of individuals in criminal investigations and the identification and location of missing and unidentified persons. Therefore, it is in the best interest of the state to establish a DNA data base and DNA data bank containing DNA samples submitted by persons convicted of felony offenses....

RCW 43.43.753 (codified as amended Laws of 2002, Ch. 289, § 1). The statute imposes a one hundred dollar fee for "every sentence" imposed under the act, but does not require an additional DNA sample from the individual if the Washington state patrol crime laboratory already has a sample. RCW 43.43.7541; RCW 43.43.754(2).

Defendant in the present case argues that if an offender has already been subject to the act and submitted a sample in an earlier qualifying conviction, the one hundred dollar fee is unnecessary and violates equal protection because those who are sentenced more than once must pay the fee multiple times. Brief of Appellant, at 18-19. They base their argument on the premise that the fees only purpose is related to the collection of the sample. However, as stated above, the purpose of the DNA database is to be used as a tool in criminal investigations, prosecutions and the detection of recidivist acts. RCW 43.43.753. It is reasonable to conclude that a defendant's previously given DNA sample could and would be used in subsequent cases for the purposes of

investigation, prosecution and detection of recidivist acts. Thus, the one hundred dollar fee imposed after "every sentence" does not go solely towards the collection of the samples, but also towards the expense of re-testing and analyzing the original sample.

This is supported by the legislature's amendment of the act in 2008. The act originally read that the fee of one hundred dollars was "for collection of a biological sample as required under RCW 43.43.754". Laws of 2002, ch. 289, § 4. In 2008, the legislature removed the language that the fee was for the collection of a biological sample so that it simply stated "[e]very sentence imposed under [this act] must include a fee of one hundred dollars". Laws of 2008, Ch. 97 § 3. It is likely the legislature recognized the fee was not solely for the purpose of obtaining the sample, but for expense of its use in later investigations and prosecutions. Therefore, removing the statement that it was "for the collection of the biological sample" was necessary to more appropriately reflect its broader purpose.

Defendant fails to show that RCW 43.43.7541 violates equal protection. The imposition of the hundred dollar fee after "every sentence" is rationally related to the purpose of not only paying for the original collection of the sample, but also for the purpose of paying for the expense of the re-testing and analysis of it in future criminal investigations, prosecutions and detection of recidivist acts.

4. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ORDERING DEFENDANT TO SUBMIT A DNA SAMPLE WHEN THERE WAS NO EVIDENCE THAT A SAMPLE OF HIS DNA WAS ALREADY IN THE WSP CRIME LAB DATABASE.

Sentencing conditions are reviewed for abuse of discretion. ***State v. Riley***, 121 Wn.2d 22, 36-37, 846 P.2d 1365 (1993). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. ***State ex rel. Carroll v. Junker***, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). "A court's decision is manifestly unreasonable, if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard." ***In re Marriage of Littlefield***, 133 Wn.2d 39, 44, 940 P.2d 1362 (1997).

RCW 43.43.754 requires that offenders convicted of certain qualifying convictions must submit a biological sample for purposes of DNA identification analysis. RCW 43.43.754(1). However, it also states that "[i]f the Washington state patrol crime laboratory already has a DNA sample from an individual for a qualifying offense, a subsequent submission is not required to be submitted." RCW 43.43.754(2).

The trial court in the present case ordered defendant to submit a sample of his DNA as his conviction for domestic violence related violation of a no contact order was one of the qualifying offenses under RCW 43.43.754(1). CP 75-76. Defendant argues the trial court abused its discretion in ordering the sample be taken because there was information in the record which suggested defendant had previously qualifying convictions which would have already required him to submit a sample. *See* Brief of Appellant, at 20-21.

However, the statute does not say "if you have a previous qualifying conviction, a subsequent submission is not required." The statute explicitly states "[*i*]*f the Washington state patrol crime laboratory* already has a DNA sample from an individual for a qualifying offense, a subsequent submission is not required to be submitted." RCW 43.43.754(2)(emphasis added). There was no evidence in the record which showed that the Washington state patrol crime laboratory already had a DNA sample from defendant. The fact that he had previous qualifying convictions suggests that it is likely he was ordered to submit in previous cases, but that does not ensure that he a) actually did so, and b) that the laboratory has a quality sample of his DNA.

The language that the submission is not required unless the laboratory has a sample is a safeguard that the legislature enacted to ensure that an actual sample is already in existence. A defendant could

have a previous qualifying offense, but it may have been before the DNA sample requirement was in effect. A defendant could have been ordered to submit a sample and failed to do so, but no one was made aware of that. A defendant could have submitted a sample that was defective for some reason. Having a previous qualifying offense on ones record does not ensure that your DNA is in the database.

An abuse of discretion occurs when the trial court's decision is manifestly unreasonable, meaning outside the range of acceptable choices. ***In re Marriage of Littlefield***, 133 Wn.2d at 44. Ordering a defendant to submit a DNA sample to ensure that the Washington state patrol crime laboratory has one is not an abuse of discretion. If it is discovered that defendant already has a valid sample in the database, then he should not be required to submit a subsequent sample. However, without conclusively knowing that, the trial court's decision cannot be considered an abuse of discretion.

5. DEFENDANT FAILS TO SHOW THE TRIAL COURT ERRED IN IMPOSING THE DAC RECOUPMENT FEE AS THE RECORD REFLECTS THE TRIAL COURT WAS AWARE IT WAS A DISCRETIONARY COST.

Under RCW 10.01.160, courts have the authority to impose costs on "a convicted defendant". Trial courts have been given wide latitude in matters relating to sentencing under statutes allowing imposition of costs and fees on a convicted defendant. ***State v. Moon***, 124 Wn. App. 190,

193, 100 P.3d 357 (2004). While some costs have been deemed mandatory by the legislature, recoupment of attorney fees is considered a discretionary legal financial obligation. *See* ***State v. Lundy***, 176 Wn. App. 96, 102-108, 308 P.3d 755 (2013). The court is required to take into consideration the financial resources of the defendant and the nature of the burden that payment of costs will impose when imposing discretionary LFOs. RCW 10.01.160(3).

The decision to impose attorney fees upon a defendant is reviewed for an abuse of discretion. ***State v. Baldwin***, 63 Wn. App. 303, 312, 818 P.2d 1116 (1991). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. ***State ex rel. Carroll v. Junker***, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). "A court's decision is manifestly unreasonable, if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard." ***In re Marriage of Littlefield***, 133 Wn.2d 39, 44, 940 P.2d 1362 (1997).

During sentencing in the present case, the following exchange took place:

[PROSECUTOR]: Thank you. And I would note its mandatory legal financial obligations, $500 crime victim assessment, the $100 DNA database fee, the $500 DAC recoupment.

THE COURT: DAC recoupment is not mandatory.

[PROSECUTOR]: I believe she was a conflict through DAC.

[DEFENSE ATTORNEY]: Yes.

[PROSECUTOR]: And the $200 filing fee. I just wanted to accurately –

THE COURT: What the court's intent is is that it be the minimum we can impose and still be consistent with the statute. It makes no sense to burden him with further financial obligations. He walks out of here and he has another problem.

RP 348-49(emphasis added).

Defendant argues that the trial court was unaware that the recoupment fee was discretionary and therefore erred when it failed to exercise its discretion. The record however, reflects that it was the court that pointed out to counsel that the DAC recoupment was discretionary. There is no question that the court knew the DAC recoupment was necessary. Rather, it appears that the imposition of the $500 may not be consistent with the trial court's oral recitation of its intent in imposing legal financial obligations. But, regardless, the court was well aware that the DAC recoupment was discretionary. The court also signed the

judgment and sentence after the colloquy took place and the $500 recoupment fee was written into the judgment and sentence. RP 348-49 (discussion of legal financial obligations; RP 352 ("[Defense attorney]: I believe that I've handed forward everything except for the page with the criminal history...). Thus, while the $500 recoupment fee may not have been consistent with the trial court's original intent, the trial court did not abuse its discretion because the record is clear it knew that cost was discretionary. The imposition of the recoupment fee may have been a scrivenor's error, but it was not a legal error which necessitates vacation of the fee.

Further, the defendant retains the ability to petition the court for remission of the payment of the costs at any point under RCW 10.01.160(4). Based on the record reflecting the trial court's knowledge that the recoupment fee was discretionary, the court should not find an abuse of discretion in the present case.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court to affirm defendant's convictions.

DATED: July 9, 2015.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

CHELSEY MILLER
Deputy Prosecuting Attorney
WSB # 42892

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

7.9.15
Date Signature

PIERCE COUNTY PROSECUTOR

July 09, 2015 - 1:21 PM

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